

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re David Shokrian M.D.
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Serial No. 88417120
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Robert Garson and Andrea T. Timpone of Garson Segal Steinmetz Fladgate LLP,
for David Shokrian M.D.

Josh Galante, Trademark Examining Attorney, Law Office 127,
Mark Pilaro, Managing Attorney.

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Before Shaw, Greenbaum and Dunn,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

I. Background

David Shokrian M.D. (“Applicant”) seeks registration on the Principal Register of the proposed mark MILLENNIAL AESTHETIC SURGERY (in standard characters, AESTHETIC SURGERY disclaimed) for:

Surgery; Cosmetic surgery services; Cosmetic and plastic surgery; Plastic surgery; Plastic surgery services, in International Class 44.¹

The Trademark Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as merely descriptive of the identified services. When the refusal was made final, Applicant requested reconsideration, which was denied. Applicant then filed a notice of appeal, and Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

II. Applicant's Request for Remand/Evidentiary Issues

A. Evidence Attached to Applicant's Brief

Applicant embedded in his appeal brief a request that the Board suspend the appeal and remand the application to the Examining Attorney for consideration of additional evidence, submitted for the first time with his brief, and to which the Examining Attorney objected.² App. Br., 4 TTABVUE 10; Ex. Atty. Br., 7 TTABVUE 2-3. The additional evidence consists of an article from FORBES and an article from

¹ Application Serial No. 88417120 was filed on May 6, 2019, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² The better practice would have been for Applicant to have filed a separately captioned request for remand with a showing of good cause and the exhibits, ideally before Applicant filed his brief. *See In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1725 (TTAB 2016) (applicant's request for remand, included in applicant's brief, denied, explaining that proper procedure "was to file with the Board, after the filing of the appeal but before briefing, a request for remand with a showing of good cause."); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1207.02 (2022) ("TBMP").

THE ATLANTIC, both dated 2015, and a “Plastic Surgery Statistics Report” from the American Society of Plastic Surgeons, dated 2020. App. Br., 5 TTABVUE 12-28.

As set forth in TBMP § 1207.02 (emphasis added):

A request under 37 C.F.R. § 2.142(d) to suspend and remand for additional evidence must be filed prior to the rendering of the Board’s final decision on the appeal. In addition, the request must include a showing of good cause thereof (which may take the form of a satisfactory explanation as to why the evidence was not filed prior to appeal), and be accompanied by the additional evidence sought to be introduced. The length of the delay in making the request after the reason for the remand becomes known, or the point in the appeal process at which the request for remand is made, will be considered in the determination of whether good cause exists. Generally, the later in the appeal process at which the request for remand is filed, the stronger the reason that must be given for good cause to be found.

Applicant did not explain why he did not submit the evidence, all of which appears to have been previously available, during prosecution. *Cf. In re Zanova Inc.*, 59 USPQ2d 1300, 1302 (TTAB 2001); *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194 n.2 (TTAB 1998) (applicant’s request for remand made in its appeal brief in order to allow examining attorney to consider additional third-party registrations denied because such evidence could have been submitted earlier in the prosecution).” For this reason, and given the relatively late stage in the appeal, Applicant has not established the requisite good cause. Accordingly, Applicant’s request for remand is denied and we do not further consider the evidence.

B. Applicant’s References to Applications/Examining Attorney’s Objection

Applicant references two applications in the body of his appeal brief, which applications are not of record, and to which references the Examining Attorney

objects. App. Br., 5 TTABVUE 9-10; Ex. Atty. Br., 7 TTABVUE 3. As the applications are not of record, and they are not the proper subject of judicial notice, we sustain the objection and do not further consider the applications. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (record should be complete before an appeal is filed); *In re House Beer, LLC*, 114 USPQ2d 1073, 1075 (TTAB 2015) (Board does not take judicial notice of files of applications or registrations residing in the Office).

C. Registrations Attached to Reply Brief

Applicant also attached to his reply brief TSDR printouts of registration records for three MILLENNIAL-inclusive marks, all of which registered on the Principal Register, with no disclaimer of MILLENNIAL, after the Examining Attorney filed his brief. Applicant asks the Board to consider the new registrations, claiming that they are “just like Applicant’s Mark.” Reply Br., 8 TTABVUE 4, 6-13.

To the extent Applicant’s request is one for the Board to take judicial notice of the registrations, we decline to do. As we just explained, third party registrations are not the proper subject of judicial notice. *House Beer*, 114 USPQ2d at 1075.

To the extent the request is an implied request for remand, we deny it for failure to establish the requisite good cause. *See, e.g., In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147 (TTAB 2011) (applicant’s request for remand denied for failure to show good cause). “There is a point at which prosecution or examination must come to an end.” TBMP § 1207.02 (example 1). We have reached that point. In any event, “Applicant’s allegations regarding similar marks are irrelevant because each application must be

considered on its own merits.” *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009).

III. Mere Descriptiveness

Absent a showing of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register which, when used in connection with an applicant’s goods or services, is merely descriptive of them.³ “A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). See also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods [or services].” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

³ “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . .” 15 U.S.C. § 1052(e)(1). Applicant made no claim that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *Bayer*, 82 USPQ2d at 1831; *see also In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). In other words, we evaluate whether someone who is familiar with the goods or services will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). In addition, the descriptiveness analysis concentrates on the identification of services set forth in the application. *See In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

A mark need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods or services, *see Gyulay*, 3 USPQ2d at 1010, or if it describes the intended users of the goods or services. *See, e.g., In re Planalytics, Inc.*, 70 USPQ2d 1453, 1454 (TTAB 2004) (GASBUYER merely descriptive of intended user of the applicant's identified risk management services in the field of pricing and purchasing natural gas); *In re Camel Mfg. Co.*, 222 USPQ 1031, 1032 (TTAB 1984) (“[T]here is no doubt that the group described by the term ‘MOUNTAIN CAMPER’ is a category of purchaser to whom applicant specifically directs its camping equipment”; MOUNTAIN CAMPER held descriptive of retail services in the field of selling camping equipment).

When two or more merely descriptive terms are combined, the composite mark “is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019); *see also DuoProSS Meditech*, 103 USPQ2d at 1758-59 (SNAP SIMPLY SAFER merely descriptive of “medical devices, namely, cannulae; medical, hypodermic, aspiration and injection needles; medical, hypodermic, aspiration, and injection syringes”); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers).

The proposed mark MILLENNIAL AESTHETIC SURGERY will be found merely descriptive if the individual components are merely descriptive, they retain their descriptive meaning in relation to the identified services, and the combination does not form a mark which has a distinctive nondescriptive meaning of its own as a whole. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (“Thus, the PTO may properly consider the meaning of ‘patents’ and the meaning of ‘.com’ with respect to the goods identified in the application. However, if those two portions individually are merely descriptive of an aspect of appellant’s goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.”).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or

surveys,” *Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods....” *Abcor*, 200 USPQ at 218. Such evidence also may be obtained from websites and publications. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017).

A. Analysis

The Examining Attorney asserts that MILLENNIAL AESTHETIC SURGERY is descriptive of the identified surgery, cosmetic surgery and plastic surgery services because it immediately describes a “characteristic, feature, purpose, and intended audience” of the services, namely, that the services “are for aesthetic purposes and are performed by or intended for use by people, especially including those that are millennials or part of the generation known as millennials.” Ex. Atty. Br., 7 TTABVUE 3.

In support of the refusal, the Examining Attorney made of record dictionary definitions of “millennial” as an adjective “Denoting people reaching young adulthood in the early 21st century,” and as a noun meaning “A person reaching young adulthood in the early 21st century.”⁴ August 14, 2019 Office Action, TSDR 2-3. He also made of record an entry for “aesthetic surgery” from FARLEX PARTNER MEDICAL DICTIONARY

⁴ The above definitions of “millennial” are from the “British & World English” LEXICO-OXFORD website (www.lexico.com/en), but they approximate the definitions in the MERRIAM-WEBSTER online dictionary (merriam-webster.com/dictionary/millennial) (accessed February 10, 2023), as an adjective meaning “(1) of or relating to a millennium,” and “(2) of, relating to, or belonging to the generation of people born in the 1980s and 1990s: of or relating to millennials,” and as a noun meaning “a person born in the 1980s or 1990s usually plural.” We take judicial notice of these definitions. *In re Heatcon, Inc.*, 116 USPQ2d 1366, 1373 n.19 (TTAB 2016) (citing *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006) and *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983)).

(2012), which defines the term as “surgery in which the principal purpose is to improve the appearance,” and which lists “cosmetic surgery” as a synonym. *Id.*, at TSDR 6. Based on the dictionary definitions of MILLENNIAL and AESTHETIC SURGERY, and noting Applicant’s disclaimer of the term AESTHETIC SURGERY and the inclusion of “surgery” in the identification of services, the Examining Attorney contends that MILLENNIAL AESTHETIC SURGERY, in its entirety, “describes surgery services with the purpose or intent of improving a persons [sic] physical appearance, specifically, a person that is a millennial or from the millennial generation.” Ex. Atty. Br., 7 TTABVUE 4.

The Examining Attorney also relies on excerpts from online articles about the increasing use by “millennials” of plastic and cosmetic surgeries for aesthetic purposes, and websites of third-party plastic and cosmetic surgeons and surgery centers, all of which use the terms “millennial” or “millennials” to refer to the target audience or user of plastic and cosmetic surgery services for aesthetic purposes. A few examples are reproduced below, with emphasis added:

- Changes Plastic Surgery & Spa webpage for “**Millennials and Plastic Surgery**”: “At Changes Plastic Surgery and Spa, we’ve noticed a fascinating trend: we’ve got more **millennials** as patients than we ever had among Generation X when they were under 30!”; “**Millennials** truly are the selfie generation, and this focus on outward appearance is driving a trend toward opting for **cosmetic procedures and plastic surgery**-both to take better selfies in the first place and to look more like the best selfies

they take in real life.” “The trend is there: **millennials** seem to be seeking out **cosmetic procedures and plastic surgery** more than older generations did at the same age.” May 26, 2020 Final Office Action, TSDR 6-11.

- Hazen Medical Spa blog titled “**Cosmetic Procedures for Millennials**”: “**Plastic surgeons** around the country have noticed an interesting trend: a surge in the number of patients in their early to mid-20s (i.e., members of the **millennial** generation) requesting non-surgical and **surgical cosmetic treatments** to stay ahead of the aging curve.” *Id.*, at TSDR 12-15.
- Scale Music City blog titled “The Treatments that **Millennials** Want”: In a section titled “Favorite **Cosmetic Surgeries** of the **Millennial Generation**,” the author states: “Rhinoplasties remain popular and socially acceptable among a generation that takes a lot of selfies and sees themselves on social media quite often. Worldwide **millennials** make up more than half of all nose surgeries.” *Id.*, at TSDR 23-25.
- CHICAGO TRIBUNE article (dated January 31, 2019) by Alison Bowen titled “Why **millennial** women are seeking out **plastic surgeons**: ‘Now it’s part of my routine.’”: “**Millennials**, a generation made up of 20- and 30-somethings, are showing up in **plastic surgeons’** offices for a variety of procedures.” “So why are **millennials** searching out **plastic surgeons**? Social media plays a factor, say surgeons, and so do celebrities, like Kylie

Jenner, who are open about injecting lips with temporary fillers.” February 10, 2021 Request for Reconsideration Denied, TSDR 8-14.

- CISION PR NEWSWIRE press release (dated February 10, 2021) from the Aesthetic Society titled “The Aesthetic Society Unveils 2021 **Plastic Surgery** Predictions”: “With more than 2,600 board-certified **plastic surgeons** comprising its membership, The Aesthetic Society is at the forefront of research, education, and what lies ahead for the **aesthetic industry**.” “Our members are dedicated to safety and will continue to educate patients and physicians on safety protocols as we continue **aesthetic surgery** in 2021.” “The popularity of injectables and facial injections skyrocketed in the last several years. It has become part of culture and the **millennial** generation is being raised with injectables and facial fillers as an accepted part of regular ‘grooming’ – just as getting one’s nails or hair done.” *Id.*, at TSDR 15-17.
- CosmetiCare Plastic Surgery and Medspa article by “sroth” titled “More and More **Millennial** Men Opting for Nose Surgery”: “More and more **millennial** men are seeking out **nose surgery and other cosmetic procedures**. This growing trend directly opposes the historical stigma against men receiving **aesthetic surgery**. ... And a young generation of **millennial** males is quickly realizing that there is no shame in going the extra mile to look and feel the way that they want.” *Id.*, at TSDR 18-21.

- Maine Plastic Surgery blog titled “**Plastic Surgery** Procedures Favored by **Millennials**”: “In the earliest days of the profession, **plastic surgery** was the sole domain of an aging wealthy female population. With the Baby Boomer generation and continual progress in **cosmetic surgery**, the appeal broadened. Now that plastic surgery is widely accepted by women and men of every age, the young 18-34 year old **Millennial** generation is embracing **cosmetic surgery** with open arms.” The blog lists breast augmentation, liposuction and breast reduction surgery as the top three most popular surgical procedures for “the **Millennial** population.” “These three surgeries are often sought after for health reasons however the **aesthetic** value is always a plus.” *Id.*, at TSDR 29-30.
- Physicians Center for Beauty blog by Dr. Sean Maguire (dated September 8, 2017) titled “**Millennials and Plastic Surgery: The Rise of Cosmetic Procedures in the Y Generation**”: “**Millennials**, adults in their 20s and early 30s, represent an increasing proportion of **plastic surgery** patients. Louisville **plastic surgeon** Dr. Sean Maguire has seen an influx of **millennial** patients come into his office to discuss their **aesthetic** concerns and goals.” *Id.*, at TSDR 36-38.
- Prejuvenation article (dated June 23, 2019) by Eileen Spatz titled “What Makes **Millennials** Consider **Cosmetic Procedures** Differently”: “Of course, those over the age of, say, 45 will quickly realize that an unfiltered selfie is not their friend; only emphasizing sags, bags, and wrinkles in an

unflattering display splashed across Facebook, but within the **millennial** ranks, many of these 18 to 35-year-olds – who came of age during the social media/selfie era – are on a quest to remain selfie-friendly indefinitely. Young celebs who openly flaunt their **cosmetic surgeries** and **aesthetic procedures** on Instagram or reality TV are fueling this unhealthy pursuit of perpetual beauty.” *Id.*, at TSDR 39-42.

The evidence of third-party use amply shows that MILLENNIAL has a normally understood and recognized descriptive meaning in the cosmetic and plastic surgery industry, in that it refers to people born in the 1980s and early 1990s, many of whom are interested in receiving, or already have received, such surgical services for aesthetic purposes. *See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (“[T]hird-party usage can demonstrate the ordinary dictionary meaning of a term of the meaning of a term to those in the trade”) (internal citation omitted). *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (third-party use and registration of a term may be an indication that a term has a suggestive or descriptive connotation in a specific industry).

We do not find persuasive Applicant’s arguments that the proposed mark is suggestive because “millennial” has other, suggestive meanings. App. Br., 5 TTABVUE 5-6, 8-10 (e.g., “the services incorporate cutting edge surgical techniques created in this millennium” or “the services will transfer [sic] a patient to appear like a ‘millennial’ or of the next millennium.” *Id.*, at 8). As stated above, we must consider

the meaning of a term in relation to the identified services, not in the abstract. *See Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831; *Abcor*, 200 USPQ at 218. That a term may have other meanings in different contexts is not controlling on the question of descriptiveness. *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018). “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (internal quotation omitted).

Based on the dictionary definitions of “millennial” and “aesthetic surgery,” and the Internet evidence of use of the term “millennial” by third parties who write about or offer cosmetic and plastic surgery services for aesthetic purposes, we have no doubt that consumers who see the proposed mark MILLENNIAL AESTHETIC SURGERY used on the identified surgery, cosmetic surgery and plastic surgery services immediately would understand that such services are offered for aesthetic purposes and they are marketed and sold to individuals who are part of the millennial generation. MILLENNIAL AESTHETIC SURGERY as a whole conveys no more than the sum of its individually descriptive parts. *See, e.g., DuoProSS Meditech*, 103 USPQ2d at 1757 (SNAP SIMPLY SAFER merely descriptive of medical cannulae, needles and syringes); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (“[W]e find that prospective consumers of the identified goods would readily understand that applicant's applied-for mark [SUPERJAWS] describes a superior vice system for grasping and holding work pieces.”).

In the absence of a showing that MILLENNIAL AESTHETIC SURGERY has acquired distinctiveness as Applicant's mark, Applicant's competitors who might offer similar aesthetic surgical services should have the opportunity to use the descriptive terms "millennial" and "millennial aesthetic surgery," or variations thereof, to describe their surgical services and the target market for those services. *See In re Boston Beer Co., L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff'd*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *Abcor*, 200 USPQ at 217 ("The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products."); *see also, e.g., Planalytics*, 70 USPQ2d at 1456 (GASBUYER "describes a feature or characteristic of the services to the extent that it immediately conveys that its services are intended for individuals who purchase natural gas.").

B. Conclusion

For these reasons, we find that Applicant's proposed mark merely describes the identified services.

Decision: The refusal under Section 2(e)(1) of the Trademark Act to register Applicant's proposed mark MILLENNIAL AESTHETIC SURGERY is affirmed.